IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1289

HAZEL PALMER, ET AL., *Petitioners*,

v.

ALLEN C. THOMPSON, Mayor, City of Jackson, ET AL., *Respondents*.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Four black citizens of four cities in Mississippi hereby respectfully seek leave to file the attached brief *Amicus Curiae* in this case. The attorney for petitioners has consented; the attorney for respondents has refused consent.

The *Amici Curiae* are as follows: James Moore, Greenwood, Mississippi; C. O. Chinn, Canton, Mississippi; Willie Crump, Edwards, Mississippi; and Minnie McFarland, West Point, Mississippi. The issue involved in this suit, the closing of the public swimming pools in the City of Jackson after an order desegregating those pools had been obtained, is one of vital concern to them because a similar pattern of events has taken place in each of their cities. All four cities formerly had public swimming pools which were used by white people only, and which, after the

passage of the Civil Rights Act of 1964, and after attempts to integrate the pools, were closed or conveyed to private groups which continued the white-only policy.

In three of the cases, Greenwood, Canton and Edwards, there was litigation in which the *Amici* here were named plaintiffs representing the class of all black residents of those cities. In West Point, there was no litigation, but Mrs. McFarland is the mother of one of the boys who sought to integrate the pool on July 4, 1964.

Amici seek to file this brief in order to demonstrate the pervasive nature of the pattern of closing public facilities after attempts to integrate. By showing that the problem is not limited to the City of Jackson, and by showing that the practice of closing facilities is an integral part of a pattern of segregation, the *Amici* hope to show that this case is so important that this Court should grant review.

Respectfully submitted,

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BRIEF AMICUS CURIAE

THE INTEREST OF AMICI CURIAE IN PALMER v. THOMPSON

In 1963, the City of Jackson, Mississippi, was ordered to integrate its municipal swimming pools. *Clark* v. *Thompson*, 206 F.Supp. 539 (1963), *aff'd*, 313 F. 2d 637, *cert. den.*, 376 U.S. 951 (1963). The response of the City to that decision was to cease operating any of its five swimming pools. Four pools were closed and have remained closed since 1963; the City has no intention of reopening them. The fifth pool had been leased by the City, which terminated its lease, and the pool is operated by the Y.M.C.A. for whites only.

Black citizens of Jackson then filed suit to require the City of Jackson to reopen the pools. Relief was denied in the district court, and the denial was affirmed by the Fifth Circuit, both by a panel, and by the full court sitting en banc (six judges dissenting). *Palmer* v. *Thompson*, — F. 2d — (5th Cir. 1969). The black plaintiffs have now petitioned this Court for a writ of certiorari to review the en banc decision of the Fifth Circuit. This *Amicus* brief is filed by black residents of Canton, Edwards, Greenwood, and West Point, Mississippi, four other cities where black citizens have had similar problems gaining access to public swimming facilities. What has happened in Jackson, Mississippi, is not an isolated incident. To the contrary, it is part of an historical context and a contemporary strategy. Many other towns, particularly in Mississippi, are closing down their recreational facilities or otherwise taking steps in an attempt to thwart integration. The information concerning these cities is shown in the attached affidavits, and indicates the extent of the pattern shown in this case:[1]

> *Canton:* In Canton, Mississippi, thirty miles from Jackson, the town leased a municipal pool to a private all-white association. When the lease was declared void and the pool ordered desegregated in an unreported opinion by Judge Harold Cox. *Chinn* v. *Canton, Cir.* No. 3764 (S.D. Miss. Nov. 18, 1965), Canton closed the pool. It remains closed today. An appeal from that part of Judge Cox' decision of November 18, 1965, denying plaintiffs' application for an order prohibiting

[1] Affidavits setting forth the facts relating to *Amici's* four cities are attached hereto. These facts are of course not part of the record of this case, but they do go to show the importance of the issue involved and the reason why this Court should deem the issue of law to be one of sufficient magnitude to grant review.

Canton from closing the pools is pending in the United States Court of Appeals for the Fifth Circuit. *Chinn* v. *Canton,* No. 23229.

West Point: In West Point, Mississippi, when black children made use of a formerly all-white municipal pool, it was closed immediately and filled with dirt, a condition in which it remains to this day.

Edwards: In Edwards, Mississippi, the town has sold the pool that it operated for over twenty years to a "private" all-white club. Black citizens of Edwards sued to gain access to the pool but the district court found that the sale was legitimate. *White Town of Edwards,* Civ. No. 3937 (S.D. Miss. Sep. 9, 1966)

Greenwood: In Greenwood, Mississippi, the formerly all-white municipal pool was recently closed and the town has announced that it will not be reopened. That pool had been used for over thirty years by the white citizens of Greenwood. A suit is presently pending in the United States District Court for the Northern District of Mississippi to compel the town to reopen the pool. *Moore* v. *Henry,* No. GC 6938-S (N.D. Miss.).

Amici therefore realize that the outcome of *Palmer* v. *Thompson* will have a critical effect on our struggles for equality and justice in our own communities.

REASONS FOR GRANTING THE WRIT

The Importance of This Lawsuit

For the reasons set forth below *Amici* believe the Court of Appeals erred in affirming the denial by the District Court of Petitioners' application for an injunction. If that decision is not reversed, the practice of closing or of threatening to close public facilities

will become widespread. Thousands of people in many communities will feel the brunt of this strategy if it is not prohibited by this Court. Our own communities have already been affected by it. For the reasons set forth below black people throughout this Nation will be reluctant to seek through the courts the civil rights to which we are entitled, if the result is the closing of a public facility. The decision of the Court of Appeals thus poses a substantial threat to our civil rights and our civil liberties. This is why we are *Amici Curiae* in this suit; this is why it is important that this Court review that decision.

This case is important viewed from another perspective. The step taken by the City of Jackson in this case represents a new phase in the continuing fight for equality. What is of great significance is that it may very well mark the final stand that opponents of integration in public facilities can take. For it is clear that public facilities must be open to black and white alike. *Watson* v. *Memphis,* 373 U.S. 526 (1963). It is also clear that a city cannot avoid limitations imposed upon its facilities by the Equal Protection Clause by transferring the title to those facilities to private persons. *Evans* v. *Newton*, 382 U.S. 296 (1966). Neither can it place its weight of authority behind private discrimination, *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961), nor encourage it. *Reitman* v. *Mulkey,* 387 U.S. 369 (1967). The cumulative practical effect of those decisions and a decision in this case reversing the Court of Appeals will be final victory in the struggle for equality and integration in public facilities. It will have taken three hundred and fifty years, an inestimable amount of litigation over the past sixteen years and not a little courage, but part

of the wall of racial separation that has stunted this Nation's growth for so long will have finally crumbled. Then, at least, we can say that all that has gone before has not been in vain.

The Error of the Court Below

I. THE CLOSING OF MUNICIPAL POOLS FOR THE DISCRIMINATORY PURPOSE OF AVOIDING COURT-ORDERED INTEGRATION CONSTITUTES A DENIAL OF THE EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY THE FOURTEENTH AMENDMENT AND A BADGE OF SLAVERY PROHIBITED BY THE THIRTEENTH AMENDMENT.

If the pools were closed with the discriminatory purpose of preventing court-ordered integration and their use by black people, that act denied Petitioners equal protection of the law, *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218 (1964); *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649 (1961) *aff'd.*, 368 U.S. 515 (1962), and imposed a badge of slavery, *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), condemned by the Thirteenth Amendment itself. *See* Kinoy, "The Constitutional Right of Negro Freedom Revisited: Some First Thoughts on *Jones* v. *Alfred H. Mayer Co.*, 22 Rutgers L. Rev. 537 (1968).

This case was decided below as if it were a traditional factual dispute. Plaintiffs Palmer *et al.* [hereinafter "Petitioners"] alleged in their complaint that the pools were closed "for the purpose of excluding and continuing the exclusion of Negroes from the equal enjoyment" of the pools. One of the petitioners, Carolyn Stevens, asserted in her affidavit that there was "an unequivocal intention on the part of the chief executive of the City of Jackson to prevent integration of the races at public facilities of the City of Jackson

at whatever cost." *See* Affidavit, pp. 69-70 in Petition for Writ of Certiorari and Affiant's Exhibit "B", pp. 72-73 in Petition.

As against this, the only rebuttal presented by Defendents Thompson *et al.* [hereinafter "Respondents"] was in the form of two vague and conclusory statements by Mayor Thompson and Park Director Kurts. Thompson said the pools were closed because the city "realiz[ed] that the personal safety of all of the citizens of the City and the maintenance of law and order would prohibit the operation of swimming pools on an integrated basis, and . . . that the said pools could not be operated economically on an integrated basis." *See* Affidavit, p. 77 in Petition. Kurts claimed "that the City of Jackson would suffer a serious financial loss if it attempted to operate said pools, or any of them, on an integrated basis." *See* Affidavit, p. 75 in Petition. The District Court (W. Harold Cox, J.) accepted these reasons without question, as did seven judges of the Court of Appeals. The question is whether, in the circumstances of this case, the City of Jackson was entitled to have its bald assertions accepted so readily.

For the reasons set forth below, *Amici* believe the City bore the burden of proving its reasons, and of establishing that it had not acted simply to avoid integrating its pools. *Amici* further believe the City's conclusory statements were far from meeting that burden.

The history of the South is the story of white resistance to the mixing of the races. The story is replete with variations in strategy but is held together by one underlying theme: the desire to preserve the

wall of racial separation. The closing of swimming pools in Jackson, Mississippi, is but the latest device to achieve that end; it marks a new phase in a continuing struggle.

Slavery was, of course, the first stage of that struggle. It was bottomed on the "axiom in morals as well as in politics" that black people were "beings of an inferior order; and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect." *Dred Scott* v. *Sandford*, 60 U.S. 393, 407 (1857). And, in fact, slaves were not allowed to associate with whites. They had separate "living" facilities and were in all respects separated from the white world—except to serve it.

When slavery was abolished by the Thirteenth Amendment in 1865, the Southern states responded by passing the infamous Black Codes. Although the Codes were subsequently limited by the Fourteenth and Fifteenth Amendments, the white South nevertheless found it was able to get along quite well under the infamous "separate-but-equal" doctrine of *Plessy* v. *Ferguson*, 163 U.S. 537 (1896).

In 1954, this Court declared that separate public schools were inherently unequal and thus violated the Equal Protection Clause of the Fourteenth Amendment. *Brown* v. *Board of Education*, 347 U.S. 483 (1954). Resistance to this decree on the part of racial separatists was entirely predictable. The strategies they employed are legendary and seemingly endless. A comprehensive survey of those tactics is made in 2 Emerson, Haber & Dorsen, *Political and Civil Rights in the United States* (Third Ed.) 1630-65. They in-

clude interposition resolutions, the Southern Manifesto, the use of force to block the entrance of blacks to state universities, and the use of police dogs to attack civil-rights demonstrators. As these not-so-subtle forms of resistance proved ineffective, the South turned to other avenues. The phrase "all deliberate speed" in *Brown* v. *Board of Education*, 349 U.S. 294 (1955), was interpreted by segregationists to mean all deliberation and no speed, and the notorious (and incorrect) dictum in *Briggs* v. *Elliott*, 132 F. Supp. 776, 777 (1955) ("The Constitution does not compel integration. It merely forbids discrimination.") became a rallying cry. The language of these two cases was twisted by school boards across the South to cloak their perpetuation of racial segregation in the guise of credibility. Other devices employed to prevent integration of public schools are collected in footnote 5 of Mr. Justice Douglas' concurring opinion in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 448 (1968). Finally, with this Court's decision this term in *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969), the focus of resistance to school integration has been on freedom-of-choice plans or laws (already largely outlawed precisely because such plans fail to break the wall of segregation) and on anti-bussing amendments to Congressional legislation. Like the closing of pools, anti-bussing legislation applies, on its face, equally to black and white and thus comes disguised as credible and neutral. Like the closing of pools, it is merely another contrivance to preserve the wall of racial separation.

Segregation in other public facilities was common, if not universal, until found to be in violation of the Equal Protection Clause. *See, e.g.*, the cases collected

in Emerson, Haber & Dorsen, *supra,* at 1627-28, n. 4. Miscegenation statutes were used throughout the South, until *Loving* v. *Virginia,* 338 U.S. 1 (1967), to preserve the wall of racial separation in the marital relationship. Civil-rights workers were assaulted or killed, *see United States* v. *Price,* 383 U.S. 787 (1966), or otherwise harassed. *See* Emerson, Haber & Dorsen, *supra,* at 1646-7, n. 5. *See also Sobol* v. *Perez,* 289 F. Supp. 392 (1968).

In recent years, resistance has largely taken the form of attempting to divest government of title to property, *Evans* v. *Newton,* 392 U.S. 296 (1966), encouraging private discrimination, *Reitman* v. *Mulkey,* 387 U.S. 369 (1967) and making it more difficult to pass anti-discrimination legislation. *Hunter* v. *Erickson,* 393 U.S. 385 (1969). It has also taken the form of attempted economic retaliation, such as the Governor of Mississippi's recent vetoes of desperately needed Head Start programs in response to this Court's refusal in *Alexander* to countenance further delays in the desegregation of Mississippi school districts.

Nowhere in the United States has this unyielding resistance to racial desegregation been more evident than in Jackson, Mississippi. Opposition to racial mixing is *required* by Mississippi law. Section 4065.3 of the Mississippi Code requires that all state and local officials, expressly including mayors, take any steps necessary to prevent in public parks and public places of amusement, recreation or assembly, among other places, "a mixing or integration of the white and Negro races" caused "by any branch of the federal government." The statute further requires these state and local officials to prevent the implementation of any order by any agency of the federal government where

the order is based on the authority of *Brown* v. *Board of Education,* 347 U.S. 483 and 349 U.S. 294, and where the order causes "a mixing or integration of the white and Negro races" in public parks and public places of amusement, recreation or assembly, among others. The full text of Section 4065.3 is attached hereto.

The City of Jackson's opposition to racial mixing was recognized, indeed, in the very year the pools were closed, as a "steel-hard, inflexible, undeviating official policy of segregation." *United States* v. *City of Jackson,* 318 F.2d 1 (1963). It has also been recognized that the city officials of Jackson, including Mayor Thompson, seek to enforce that policy at all costs. *See NAACP* v. *Thompson,* 357 F.2d 831 (1966), where Mayor Thompson and other local officials had to be enjoined from denying black citizens the right to protest racial discrimination and from denying black citizens equal access to public facilities. *See Strother* v. *Thompson,* 372 F.2d 654 (1967), and *Guyot* v. *Pierce,* 372 F.2d 658 (1967), for other examples where Mayor Thompson and other local officials sought to prevent constitutionally protected activity of black citizens of Jackson which they feared would result in racial mixing.

It is thus well-established that Mayor Thompson and other local officials were required by law to oppose the implementation of the integration order issued by the United States District Court in *Clark* v. *Thompson, supra,* and that they had zealously and enthusiastically sought to enforce Section 4065.3 and its policy of racial separation even after the 1963 closing of Jackson's pools.

Nor was the City of Jackson alone in its actions with respect to swimming pools. In each of the hometowns

of *Amici*, the sequence of events is similar. *See* Affidavits attached hereto. In Edwards, the town operated an all-white pool for over twenty years and then sold it in 1965 for a price that was patently ridiculous. One of the reasons given for the sale was numerous complaints by "widows and elderly couples who did not have occasion to enjoy the use of the pool." The pool was sold to a club headed by the Mayor's brother, which club then operated the pool so as to deny membership only to black persons and white civil rights workers.

In Greenwood, the pool was operated on an all-white basis for over thirty years. Immediately after passage of the 1964 Civil Rights Act and after an attempt was made to integrate the pool, the City leased it to the Kiwanis Club. The Kiwanis Club denied blacks the use of the pool. A suit was commenced in August, 1969, to compel integration of the pool. It was announced in October, 1969, that the lease was cancelled and the pool was to be closed permanently.

In Canton, the city tried to lease its all-white pool in 1965 to a "private" association. Two days after the lease was declared null and void, black persons tried to use the pool but were told the pool was closed. The very next day the Mayor and Board of Aldermen passed a resolution closing all recreational facilities. Both the all-white pool and the all-black pool which the city also operated were closed and remained closed today.

In West Point, black citizens attempted, in 1965, to use a pool that had been used only by white persons. The City then closed the pool and filled it with dirt, a condition that remains today.

The pattern emerging from these incidents is clear. In the period between 1963 and 1965 it became increasingly evident to the officials of each of these towns that they would not be allowed to continue operating their pools on a segregated basis. They then tried to lease the pools to a "private club." If that proved unavailing the pools were then closed. In West Point, the middle step was simply omitted. The Jackson closing is simply one more in this pattern.

Given the historical context out of which this case arises; given the responses of other Mississippi communities when faced with integration of their public pools; given the Mayor's admitted opposition to integration (see Mayor Thompson's affidavit, p. 77 of Petition for Writ of Certiorari); given Section 4065.3 of the Mississippi Code, which *requires* Mayor Thompson and all other officials of Jackson to prevent the implementation of the integration order of the federal court in *Clark* v. *Thompson;* and given the other occasions where Thompson and others sought to fulfill the requirements of Section 4065.3, it is impossible to conclude that the closing of Jackson's pools was based on anything other than the specific discriminatory intention of preventing implementation of the integration order of *Clark* v. *Thompson* and of preventing racial mixing in the swimming pools.

A precisely analogous situation arose in *Johnson* v. *Branch,* 364 F.2d 177 (1966), where the Fourth Circuit Court of Appeals was called upon to determine the reason for a school board's firing of a black teacher. The board insisted that the firing was based on the plaintiff's inability to perform certain duties required of her in a prompt and cooperative manner. The plaintiff alleged the firing was the result of her involvement

in civil-rights activity in the community. What the Court of Appeals said there, in ordering the board to renew Mrs. Johnson's contract, applies equally to the City of Jackson here:

> "In weighing the reasons offered by the Board to support its contention that it did not act arbitrarily, we cannot ignore the highly charged emotional background of a small eastern North Carolina community in the throes of a civil rights campaign where more than 51% of the population was Negro and where the two members of the board who voted against the plaintiff confessed to knowledge of her husband's activity and their opposition to school desegregation. *To accept such an analysis we would have to pretend not to know as judges what we know as men.* It is apparent on this record that absent the racial question, the issue would not have arisen. The only reasonable inference which may be drawn from the failure to renew Mrs. Johnson's contract in the fact of her splendid record of twelve years on such trivial charges was the Board members' objections to her racial activity." (Emphasis added.) 364 F.2d at 182.

Even if these circumstances are not thought to be conclusive, they do, at the very least, constitute a prima facie case of discrimination, which, under familiar lines of holdings in analogous areas of civil rights law, is enough to shift the burden of proof to the respondents and require them to present substantial and probative evidence that their actions were not based on illegitimate grounds.

Many courts have recognized that a long history of racial discrimination creates a presumption that official acts adversely affecting black persons were intended to discriminate against those persons. *See Rolfe* v.

County Board of Education of Lincoln County, 391 F.2d 77, 80 (1968); *Chambers* v. *Hendersonville City Board of Education,* 364 F.2d 189, 192 (1966); *Alabama State Teachers Ass'n* v. *Lowndes County Board of Education,* 289 F. Supp. 300, 305 (1968).

So also, in cases involving alleged jury discrimination, it has been the consistent holding of this Court that a history of racial discrimination in a particular location shifts the burden of proof with respect to the issue in a particular case to the prosecution. Furthermore, the burden is *not* satisfied by the mere assertion by public officials that there has been no discrimination. *See, e.g., Eubanks* v. *Louisiana,* 356 U.S. 584 (1958); *Reece* v. *Georgia,* 350 U.S. 85 (1955); *Avery* v. *Georgia,* 345 U.S. 559 (1953).

Again, this Court recently took a similar course in *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19 (1969), which involved the adoption of plans designed to abolish dual school systems. The history of school desegregation in Mississippi made it likely that any change suggested by a school board in a plan ordered by the Court of Appeals would in fact result in less integration. As a result this Court put the burden on the school boards to show that proposed changes in plans were constitutional, by providing that the Court of Appeals plan should be followed in all respects while the district court considered proposed changes.

Finally, compare Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, which, because of the history of southern states' use of voting laws to deny equal rights, creates a presumption in these states (including Mississippi) that any change in a voting law

adopted after November 1, 1964, will have a discriminatory purpose or effect, and therefore suspends any such change unless the state can carry its burden of proving that the change did not have such purpose and will not have such effect.

Similarly, the context and historical background of Jackson's pools requires a presumption that it was done solely to prevent implementation of the *Clark* v. *Thompson* order which would have lead to racial mixing. Such a presumption has not been rebutted by Respondents, who were unable to offer a shred of evidence to support the two excuses they offered. Furthermore, their allegations went not to past acts but were simply speculative predictions of the future. Under those circumstances, Respondents' allegations are entitled to no weight whatsoever. As in *Watson* v. *Memphis,* 373 U.S. 526, 537, this Court should not assume what might happen in the future if the facilities in question are integrated.

II. CLOSING MUNICIPAL POOLS IN RESPONSE TO A SUCCESSFUL LAWSUIT BY BLACK PEOPLE TO INTEGRATE THOSE POOLS CONSTITUTES AN IMPERMISSIBLE CHILLING EFFECT ON PETITIONERS' RIGHT TO PETITION FOR REDRESS OF GRIEVANCES AND THEIR FREEDOM OF EXPRESSION.

This Court has recognized that litigation is a form of political expression and a means of petitioning the government for a redress of grievances, and therefore is protected activity under the First Amendment. *NAACP* v. *Button,* 371 U.S. 415 (1964).

The closing of Jackson's pools under the circumstances of this case is a penalty for and a deterrent to such First Amendment activity. The closings were concededly a direct response to the efforts of black people in Jackson to desegregate the public pools that

were formerly all-white. They penalized black people for petitioning for desegregation of the pools in two ways. The results of the litigation were to deny black people the use and enjoyment of any public pool where previously there was one pool opened to them, and secondly, to engender animosity toward black people on the part of whites who formerly had the use of public pools but now have the use of none because of the desegregation litigation. These same two consequences act as deterrents to future litigation by black people seeking equality of treatment. The closings therefore have a chilling effect upon legitimate First Amendment activity, for the threat of sanctions may deter constitutionally protected activity almost as potently as the actual application of sanctions. *Dombrowski* v. *Pfister,* 380 U.S. 479, 486 (1965); *NAACP* v. *Button,* 371 U.S. at 433.

It is of no constitutional moment if the impairment of First Amendment rights is an indirect result of governmental action or if it is unintended:

> The fact that Alabama . . . has taken no direct action . . . to restrict the right of petitioner's members to associate freely, does not end inquiry into the effect of the production order. *See American Communications Association* v. *Douds,* 339 U.S. 382, 402. In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action. Thus in *Douds,* the Court stressed that the legislation there challenged, which on its face sought to regulate labor unions and to secure stability in interstate commerce, would have the practical effect of "discouraging" the exercise of constitutionally protected political rights." *NAACP* v. *Alabama,* 357 U.S. 449, 461 (1958).

Indeed "the governmental action challenged may appear to be totally unrelated to protected liberties." *NAACP* v. *Alabama,* 357 U.S. at 461. *See also Grosjean* v. *American Press Co.,* 297 U.S. 233 (1936) and *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943).

In *Button,* this Court stated:

> "Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. Just as it was true of the opponents of New Deal legislation during the 1930's, for example, no less it is true of the Negro minority today. *And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances."* (Emphasis added.) 371 U.S. at 429-30.

In the context of civil rights activity in Mississippi, deterring litigation has consequences of the gravest import. For it is a fact of life that in Mississippi in the year 1970, litigation remains virtually the only effective way to achieve the lawful objective of equality of treatment. If they are punished for seeking redress of their grievances in the only legal way that achieves results, where then can black people turn? The issue before this Court is thus whether the reasons advanced for the pool closings are constitutionally sufficient to justify their deterrent effect upon the critical and constitutionally protected activity of black people in this case.

The City alleged, first, that white opposition to pool integration posed a sufficient threat to the public safety to justify closing the pools. The Mayor's claim was simply a very general prediction. *See* Affidavit, p. 77 of Petition. It is entitled to exactly the same weight given a similar prediction in *Watson* v. *Memphis* where

the defendant, "beyond making general predictions, gave no concrete indication of any inability of authorities to maintain the peace . . . Moreover, there was no factual evidence to support the bare testimonial speculations that authorities would be unable to cope successfully with any problems which in fact might arise or to meet the need for additional protection should the occasion demand." 373 U.S. at 536-37. The prediction was therefore discounted. This Court's decisions in *Terminello* v. *Chicago*, 337 U.S. 1 (1949), *Edwards* v. *South Carolina*, 372 U.S. 229 (1963), *Cox* v. *Louisiana*, 379 U.S. 536 (1965) and *Aaron* v. *McKinley*, 173 F. Supp. 944, *aff'd sub nom. Faubus* v. *Aaron*, 361 U.S. 197 (1959), make it clear that such an excuse is constitutionally inadequate here.

In *Terminiello* the defendant gave a controversial speech that resulted in several disturbances by an angry and turbulent crowd, disturbances that the police were not able to prevent. This Court held that the First Amendment precluded his conviction for disorderly conduct. In *Edwards* v. *South Carolina*, *supra*, this Court affirmed its position in *Terminiello* and pointed out that even the necessity for police protection fell far short of sufficient justification for impairment of protected expression. 372 U.S. at 237.

In *Cox* v. *Louisiana*, *supra*, the views expressed in *Terminiello* and *Edwards* were reiterated. The Court found that the "compelling answer" to an asserted justification for infringing First Amendment rights based on the presence of a hostile crowd of approximately two hundred persons and the necessity for police protection was that "constitutional rights may not be denied simply because of hostility to their exercise. *Watson* v. *Memphis*, 373 U.S. 526, 535." 379

U.S. at 551. And in *Aaron* v. *McKinley, supra,* the Court accepted fully a District Court's findings that violence would occur if public schools were integrated and, nevertheless, held unconstitutional a state statute authorizing their closing in that circumstance. 173 F. Supp. 944, 950, *aff'd sub nom. Faubus* v. *Aaron,* 361 U.S. 197 (1959).

Watson v. *Memphis, supra,* fully discredits Respondents' prediction of economic loss as justification for impairing the First Amendment rights of black people. Memphis sought to continue to deprive blacks of the equal use of city parks on the ground that integration would require a closing of some parks due to the additional expenses resulting from integration. The Court rejected this justification, first, because there had been only an allegation of increased costs, no showing of such. Secondly, the Court said: "More significantly, however, it is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them" 373 U.S. at 537.

There is further reason why the economic rationale given for closing the pools is insufficient justification.[2] In *Robinson* v. *Florida,* 378 U.S. 153 (1964), a Florida restaurant refused service to blacks solely on the basis of their race. The manager of the store testified that refusal was based on the economic factor, that serving blacks would be very detrimental to business, due to the objections of white customers. The question was whether the state was so involved with the refusal that it constituted a denial of equal protection within the meaning of the Fourteenth Amendment. This Court

[2] This applies equally to the law-and-order rationale as well.

found sufficient state involvement, as a matter of law, in a Florida health regulation that mandated separate restaurant facilities for blacks and whites. This Court said: "While Florida regulations do not directly and expressly forbid restaurants to serve both white and colored people together, they certainly embody a state policy putting burdens upon any restaurant which serves both races, burdens bound to discourage the serving of the two races together." 378 U.S. at 156. *See also Lombard* v. *Louisiana*, 373 U.S. 267 (1963) and *Peterson* v. *City of Greenville*, 373 U.S. 244 (1963). In the case at bar the State of Mississippi and the City of Jackson have a "steel-hard, inflexible, undeviating, official policy of segregation." *See* Section 4065.3 of the Mississippi Code and the discussion thereof (Point I, *supra*). That policy puts the same burden upon white people thinking about using an integrated pool as the Florida regulation put on restaurant owners considering integration of their restaurants. Like the Florida regulation, the Mississippi policy does not expressly and directly forbid racial mixing, but places psychological and economic burdens upon those whites who might otherwise accept integration.

Thus, the State of Mississippi and the City of Jackson have become significantly involved in any refusal by whites to make use of an integrated pool and in any resultant financial loss. Having itself played a significant role by reason of its official segregation policy in any such financial loss, the City cannot be heard to justify the closing of its municipal pools because of that loss. *Cooper* v. *Aaron*, 358 U.S. 1, 15-16 (1958).

III. CLOSING THE FORMERLY ALL BLACK POOL IN COLLEGE PARK WAS ARBITRARY AND CAPRICIOUS AND THEREFORE VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Due process of law means a person's liberty may not be interfered with, under the guise of protecting the public interest, by governmental action which is arbitrary or without reasonable relation to some purpose within the competency of that government to effect. *Weaver* v. *Palmer Bros., Co.*, 270 U.S. 402 (1926); *Meyer* v. *Nebraska*, 263 U.S. 390 (1923); *Adams* v. *Tanner*, 244 U.S. 590 (1917).

One of the four pools closed by the City in 1963 was the formerly all-black pool in College Park. Again, the reasons given by the City for the closings, including this particular closing, were the threat to public safety that the integration of the pools posed, and the financial loss that would accrue from integration, since whites would not use a pool open to blacks. Applying these criteria, *Amici* are at a loss to understand why the formerly all-black College Park pool was closed. If Respondents are correct, *i.e.*, if whites will not use a pool open to blacks, then, clearly, there will be no threat to public safety by keeping the all-black pool open. Notwithstanding any failure of whites to use the College Park pool, no financial loss will result to the City from implementation of the integration order *as it applies to that pool*, since virtually every black person who used the pool before the integration order will continue to use it, particularly if the other public pools are closed. In short, the integration order would have little or no effect upon the operation of that particular pool. The status quo would be maintained, nearly everyone using or not using the pool, as the case may be, exactly as before the order.

Given the inapplicability to the College Park pool of the criteria used by the City to close all four pools, the inescapable conclusion is that the closing of this particular pool was wholly arbitrary, capricious and unrelated to any legitimate governmental purpose. Said closing therefore violated the Due Process Clause of the Fourteenth Amendment. Petitioners are thus entitled to a reopening of this particular pool.

CONCLUSION

Therefore, because of the importance of this case to the Nation's well-being, because of the practical significance of this case to Petitioners, to *Amici Curiae*, to black people throughout the United States because of the threat to civil liberties that it poses, because of the importance of the constitutional issues presented, and because of our belief that they were incorrectly resolved below, we urge this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

AFFIDAVIT OF JAMES MOORE

STATE OF MISSISSIPPI
COUNTY OF LEFLORE } ss.

Personally came and appeared before me, the undersigned authority, in and for the County and State of aforesaid JAMES MOORE, who after being duly sworn by me states upon his oath that:

1. That he is 39 years old, a black citizen of the United States, and a resident of Greenwood, Mississippi.

2. That for over thirty years the City of Greenwood owned and operated a swimming pool known as the Greenwood Swimming Pool.

3. That black persons were denied the use and enjoyment of said pool.

4. That on July 10, 1964, immediately after the passage of the 1964 Civil Rights Act and after an attempt was made to integrate the pool, the City of Greenwood leased it to the Kiwanis Club.

5. That the lease was for $10.00 per year.

6. That the Kiwanis Club denied black persons the use and enjoyment of the pool.

7. That in August 1969, affiant and others filed suit to enforce their right to use the pool. *Moore* v. *Henry*, Civ. No. GC6938-S (N.D.Miss.).

8. That in October, 1969, the lease was cancelled, and the City announced that the pool was being closed permanently.

/s/ JAMES MOORE

Sworn to and Subscribed before me, this 23rd day of March, 1970.

/s/ ALIX H. SANDERS
Notary Public

My Commission expires Nov. 7, 1973.

AFFIDAVIT OF MRS. WILLIE CRUMP

COUNTY OF HINDS
STATE OF MISSISSIPPI } ss.

Personally came and appeared before me, the undersigned authority, in and for the County and State of aforesaid WILLIE V. CRUMP, who after being duly sworn by me states upon her oath that:

1. That she is 50 year old, a black citizen of the United States, and a resident of Edwards, Mississippi.

2. That from 1944 to 1965 the City of Edwards operated a concrete swimming pool and tennis courts free to town residents.

3. That no black persons used the pools in the years between 1944 and 1965.

4. That in 1965 the City of Edwards sold the property on which the pool and tennis courts were located to the Edwards Recreation Club. The property was sold for only $2,000, although it was larger than a football field, was graded and sodded and included the swimming pool and the tennis courts.

5. That the Mayor testified that the sale was made because of numerous complaints by "widows and elderly couples who did not have occasion to enjoy the use of the pool" and because of its excessive operating costs, although there were no complaints about costs when the City spent $4,000, for repairs of the pool in 1948.

6. That the Edwards Recreation Club purported to operate the pool as a so-called private club but denied membership only to black persons and white civil rights workers.

7. That the President of the Edwards Recreation Club was the brother of the Mayor of Edwards.

8. That membership in the Club is still denied today to black persons and white civil rights workers.

9. That black citizens of Edwards believe that under these circumstances they have the legal right to the use of this pool, without regard to who possesses title to it.

10. That these black citizens are reluctant to seek to gain admission to the pool. This reluctance is based on the fear that if the federal courts order the pool desegregated, the pool will be closed.

/s/ WILLIE V. CRUMP

Sworn to and subscribed before me, this 23rd day of March, 1970.

/s/ MRS. MAY ELIZABETH COX
Notary Public

My Commission Expires Oct. 21, 1972.

AFFIDAVIT OF C. O. CHINN, SR.

COUNTY OF MADISON
STATE OF MISSISSIPPI } ss.

Personally came and appeared before me, the undersigned authority, in and for the County and State of aforesaid C. O. Chinn, who after being duly sworn by me states upon his oath that:

1. That he is 51 years old, a black citizen of the United States, and a resident of Canton, Mississippi.

2. That for many years the City of Canton owned and operated through its Department of Parks and Recreation two parks, each with a swimming pool and bathhouse. Both parks and both pools had been operated, controlled, administered and supervised on a racially segregated basis. Black people were denied access to, and the use and enjoyment of the Canton Park and Recreation Center and its pool.

3. That on May 18, 1965, the Mayor of Canton leased the pool in the Canton Park and Recreation Center to the Canton Swim Association, a private group that denied all blacks the use and enjoyment of the pool.

4. That on June 28, 1965, said lease was declared null and void by the United States District Court for the Southern District of Mississippi. The City was ordered to operate the pool on a desegregated basis.

5. That on June 30, 1965, C. O. Chinn, Jr. and others black persons came to the park but were told by the Assistant Chief of Police that the pool was closed indefinitely.

6. That the Assistant Chief of Police ordered them to leave, which they did.

7. That on July 1, 1965, a special meeting of the Mayor and the Board of Aldermen of Canton was held, at which meeting a resolution was passed purporting to abolish the Department of Parks and Recreation, discontinue all recre-

ational programs, close all recreational facilities, and close all streets in the parks.

8. That the municipal pools remain closed today.

9. That black citizens have brought suit to compel the City of Canton to reopen its parks and pools on an integrated basis.

10. That affiant is a plaintiff in said suit, which is Chinn v. City of Canton, No. 23229 in the Court of Appeals, Fifth Circuit.

/s/ C. O. CHINN

Sworn to and subscribed before me, this 24 days of March, 1970.

/s/ SARAH HARVEY STEARN
Notary Public

My Commission Expires May 9, 1970.

AFFIDAVIT OF MINNIE L. McFARLAND

STATE OF MISSISSIPPI
COUNTY OF CLAY

Personally came and appeared before me, the undersigned authority, in and for the County and State aforesaid Minnie L. McFarland who after being duly sworn by me states on her oath that:

(1) That she is 42 years of age, a Black citizen of the United States, and a resident citizen of West Point, Mississippi.

(2) That, prior to July 4, 1964, the city of West Point owned and operated a municipal pool on a segregated basis.

(3) That on July 2, 1964 the Civil Rights Act went into effect.

(4) That on or about July 4, 1964, Black citizens of West Point attempted to make use of the municipal pool to which only white persons had formerly been admitted.

(5) That on or about September 1, 1964, and after and pursuant to the aforesaid attempt at utilization the pool was closed and further that on or about July 1, 1966 the city filled the pool with dirt.

(6) That the pool remains closed today.

Signed MINNIE MCFARLAND

Sworn to and subscribed before me, this the 24th day of March, 1970.

LOUIS G. DAVIS
Notary Public.

My commission expires
May 7, 1973.

MISSISSIPPI CODE

§ 4065.3. Compliance with the principles of segregation of the races.

1. That the entire executive branch of the government of the State of Mississippi, and of its subdivisions, and all persons responsible thereto, including the governor, the lieutenant governor, the heads of state departments, sheriffs, boards of supervisors, constables, mayors, boards of aldermen and other governing officials of municipalities by whatever name known, chiefs of police, policemen, highway patrolmen, all boards of county superintendents of education, and all other persons falling within the executive branch of said state and local government in the State of Mississippi, whether specifically named herein or not, as opposed and distinguished from members of the legislature and judicial branches of the government of said state, be and they and each of them, in their official capacity are hereby required, and they and each of them shall give full force and effect in the performance of their official and political duties, to the Resolution of Interposition, Senate Concurrent Resolution No. 125, adopted by the Legislature of the State of Mississippi on the 29th day of February, 1956, which Resolution of Interposition was adopted by virtue of and under authority of the reserved rights of the State of Mississippi, as guaranteed by the Tenth Amendment to the Constitution of the United States; and all of said members of the executive branch be and they are hereby directed to comply fully with the Constitution of the State of Mississippi, the Statutes of the State of Mississippi, and said Resolution of Interposition, and are further directed and required to prohibit, by any lawful, peaceful and constitutional means, the implementation of or the compliance with the Integration Decisions of the United States Supreme Court of May 17, 1954 (347 US 483, 74 S Ct 686, 98 L ed 873) and of May 31, 1955 (349 US 294, 75 S Ct 753, 99 L ed 1083), and to prohibit by any lawful, peaceful, and constitutional means, the causing of a mixing

or integration of the white and negro races in public schools, public parks, public waiting rooms, public places of amusement, recreation or assembly in this state, by any branch of the federal government, any person employed by the federal government, any commission, board or agency of the federal government, or any subdivision of the federal government, and to prohibit, by any lawful, peaceful and constitutional means, the implementation of any orders, rules or regulations of any board, commission or agency of the federal government, based on the supposed authority of said Integration Decisions, to cause a mixing or integration of the white and Negro races in public schools, public parks, public waiting rooms, public places of amusement, recreation or assembly in this state.

2. The prohibitions and mandates of this act are directed to the aforesaid exceutive branch of the government of the State of Mississippi, all aforesaid subdivisions, boards, and all individuals thereof in their official capacity only. Compliance with said prohibitions and mandates of this act by all of aforesaid executive officials shall be and is a full and complete defense to any suit whatsoever in law or equity, or of a civil or criminal nature which may hereafter be brought against the aforesaid executive officers, officials, agents or employees of the executive branch of State Government of Mississippi by any person, real or corporate, the State of Mississippi or any other state or by the federal government of the United States, any commission, agency, subdivision or employee thereof.